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BRIEF FOR RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 179.

CECIL L. COURTNEY, PHILIP T. FERRIS AND RAY PARKS, PETITIONERS,

VS.

TY LOCKETT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

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INDEX

Opinion Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Questions Presented for Review 2

Statement 3

Summary of Argument 13

Argument—

I. This Court Is Without Jurisdiction Since the Questions Presented Were Not Raised Below or Called to the Attention of or Decided by the State Court 15

II. Petitioners Are Not Entitled to Relief in Habeas Corpus, Having Failed to Exhaust Their State Remedies by Review 22

III. Petitioners Were Not Deprived of Any Rights Guaranteed to Them by the Due Process Clause of the Fourteenth Amendment 25

A. The Presiding Judge Was at All Times Acting in a Judicial Capacity 25

B. Contempt Committed in the Face of the Court, Personally Observed by the Presiding Judge, Is Punishable Without Any of the Incidents of Trial 28

C. A Sufficient Ground for the Exercise of the Contempt Power Is Conduct Which Obstructs the Administration of Justice, Such As Refusal to Obey an Order of the Court 30

D. Public Attendance Has Never Been a Prerequisite to and Can Have No Effect on the Exercise of the Contempt Power 33

Conclusion 39

Appendix 41

Citations

CASES

Bird v. *Gilbert*, 40 Kan. 469, 19 Pac. 924 ..... 14, 23
Camarota v. *United States*, (C. A. 3rd) 111 F. 2d 243, certiorari denied 311 U. S. 651 28
Edelman v. *California*, 344 U. S. 357 ..... 14, 24
Eilenbecker v. *District Court*, 134 U. S. 31 ..... 15, 35
Ferris, In re, 175 Kan. 704, 267 P. 2d 190 ..... 1, 3, 14, 18, 19, 20, 24
Fisher v. *Pace*, 336 U. S. 155 ..... 14, 30
Gambrell, In re, 160 Kan. 620, 164 P. 2d 122 ..... 13, 24
Hale v. *Henkel*, 201 U. S. 43 28
Hanson, In re, 129 Kan. 597, 283 Pac. 659 ..... 13, 14, 24
Howard v. *Fleming*, 191 U. S. 126 15
Hurtado v. *California*, 110 U. S. 516 27
Interstate Commerce Commission v. *Brimson*, 154 U. S. 447 ..... 14, 27, 28
Jack v. *Kansas*, 199 U. S. 372 ..... 18, 26
Kearney, Ex parte, 20 U. S. 7 Wheat. 38 39
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U. S. 430 15
Myers v. *United States*, 264 U. S. 95 ..... 15, 35
New York ex rel. Cohn v. *Graves*, 300 U. S. 308 ..... 15, 21
New York ex rel. Rosevale Realty Co. v. *Kleinert*, 268 U. S. 646 ..... 13, 15
Nugent, Ex parte, (C. C. D. C.) Fed. Case No. 10,375, 1 Hayw. & H. C. C. 287, 1 Am. L. J. 107, 1 Brunner's Collected Cases 296 ..... 36, 37
Oliver, Re William, 333 U. S. 257 ..... 19, 25, 26, 32, 36, 37, 38
Robinson, Ex parte, 86 U. S. 19 Wall. 505 ..... 30, 32
Sacher v. *United States*, 343 U. S. 1 ..... 14, 15, 29, 32, 33, 34
Savin, Re, 131 U. S. 267 30

BLEED THROUGH POOR COPY

Sims, In re, 54 Kan. 1, 37 Pac. 135 26
State, The, v. *Jack*, 69 Kan. 387, 76 Pac. 911 ..... 14, 26
Terry, Ex parte, 128 U. S. 289 ..... 14, 15, 30, 33, 34, 37, 38
Wallace v. *Weber*, 134 Kan. 201, 5 P. 2d 855 ..... 14, 23
Whitney v. *California*, 274 U. S. 357 21
Wilson v. *Cook*, 327 U. S. 474 ..... 13, 15
Woods v. *Nierstheimer*, 328 U. S. 211 ..... 14, 25

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the Constitution of the United States 20, 35
Fourteenth Amendment to the Constitution of the United States 3, 25, 39
Section Ten of the Kansas Bill of Rights 20

STATUTES

Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U. S. C. 401 31
Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. 1257 2
G. S. Kansas, 1949, 20-1203 ..... 2, 43
G. S. Kansas, 1949, 20-1205 ..... 2, 14, 23, 44
G. S. Kansas, 1949, 60-2213 ..... 2, 13, 23, 43
G. S. Kansas, 1949, 62-301 ..... 2, 3, 41

MISCELLANEOUS

Federal Rules of Criminal Procedure, 42(a) 29, 30
Rapalje, Contempt 28, 30, 38

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BRIEF FOR RESPONDENT.

OPINION BELOW.

The majority (R. 173-189) and dissenting (R. 189-192) opinions in the Supreme Court of Kansas are reported as *In re Ferris*, 175 Kan. 704, 267 P. 2d 190.

JURISDICTION.

The judgment of the Kansas Court was entered March 3, 1954 (R. 175), rehearing denied April 14, 1954 (R. 196). The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code (62 Stat. 929).

CONSTITUTIONAL PROVISIONS INVOLVED.

Petitioners rely on Section One of the Fourteenth Amendment to the Constitution of the United States, set forth in the appendix to Petitioners' Brief (p. 47).

Statutes involved are General Statutes of Kansas, Sections 62-301, 20-1203, 20-1205 and 60-2213, all of which are set forth in the appendix hereto.

QUESTIONS PRESENTED FOR REVIEW.

A. Does this court have jurisdiction to review a judgment of the Supreme Court of Kansas denying writs of habeas corpus where the Federal Constitutional questions presented to this Court were not presented in the applications for writ of habeas corpus, were not raised in oral argument or briefs, in motion for rehearing or otherwise called to the attention of, or decided by, the Kansas Court?

B. Does this Court have jurisdiction to review such a judgment when the questions, if they had been presented below, would not have been within the jurisdiction of the state court to determine in a habeas corpus proceedings and when petitioners have failed to exhaust adequate state remedies by review proceedings of the contempt judgments of which they now complain?

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C. Were petitioners deprived of rights guaranteed to them by the due process clause of the Fourteenth Amendment to the Constitution, when they were punished for direct contempt *in facie curiae* for failure to answer questions in an investigatory proceeding, simply because the doors of the courtroom were not opened to the public after the contempt and prior to their sentencing?

STATEMENT.

Petitioners were held in direct contempt of court for refusal to answer questions as witnesses in judicial proceedings under a Kansas Statute (G. S. Kan. 1949, 62-301, Appendix) providing for the investigation of offenses against the state.

The statute provides that such judicial proceedings, unhappily denominated an "inquisition," be initiated by the county attorney. In order to institute such proceedings, he is required to file with the court a written statement alleging offenses against the laws of the state. On the written praecipe of the county attorney, the judge issues subpoenas requiring witnesses to appear and testify concerning the offenses. The testimony must be reduced to writing.

No person is excused from testifying on the ground that his testimony may incriminate him; but he is given complete immunity from prosecution coextensive with his constitutional privilege against self-incrimination.[1] *In re Ferris*, 175 Kan. 704, 711, 267 P. 2d 190.

The presiding judge is empowered to fine and imprison a witness for contempt on account of his refusal to answer questions touching the matter.

---

[1]A question raised below, decided adversely to petitioners, and abandoned here.

The investigation is initiated and conducted by the county attorney. It is carried on, however, in the court's presence and under his judicial supervision. The statute gives the court no investigative function or duties.

The county attorney is responsible for the institution and prosecution of subsequent criminal proceedings if the testimony at the investigation reveals that an offense has been committed.

On January 7, 1954, the county attorney of Sedgwick County filed with the clerk of the District Court of that county a statement and request for such an "inquisition" (R. 28-29).

The statement alleged that unknown individuals had been guilty of assault and battery and of causing damage to and the destruction of property by the use of bombs in connection with a certain labor dispute. The prayer was that an inquisition be held to inquire into the facts of such offenses (R. 28-29).

The cause was docketed by the clerk as any other judicial cause and given a case number. It was regularly assigned to Division No. 1 of the court and transferred to Division No. 2 for the reason that Division No. 1 was occupied in the trial of cases (R. 29-30).

The county attorney filed praecipes requesting petitioners to appear. The court issued subpoenas and the petitioners were called and appeared as witnesses (R. 35-36, 46-47, 88-89).

A full and complete record was made by the official court reporters of all proceedings, and all relevant portions thereof are contained in the printed record in this court. Proceedings were conducted with the public excluded (R. 14-15, 37-40, 49-82, 85, 92-98).

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Petitioner Ferris was the first of the three to appear (R. 37).

An assistant county attorney questioned him as to his age, name, and address and then advised him as to the purpose of the investigation (R. 37). He then was asked whether he was willing to give the county attorney's office aid and assistance in finding out who it was that was responsible for the various acts of violence (R. 37). The witness replied:

> "A. I refuse to answer any question; it would be in violation of the 14th Amendment. I have no legal counsel and it is a violation under Kansas Law.
>
> * * * * * * *
>
> "Q. You understand the Court will instruct you upon your constitutional right to object?
>
> "A. I also understand anything I might say I might be prosecuted for under Federal Law, if not State Law.
>
> "Q. You understand if you refuse to answer these questions the Court will have no alternative but to handle the matter as a contempt case?
>
> "A. I refuse to answer them because I have no legal counsel" (R. 37-38).

The witness nevertheless answered a number of questions regarding his citizenship and prior activities (R. 38).

The court interrupted the questioning to explain to the witness his rights, as follows (R. 38-39):

> "The Court: At this point I would like to interrupt. Mr. Ferris, any questions that are asked of you and the answers you feel might tend to incriminate you with reference to any of the violations of our State Criminal Law, you have the right to object to answer them. But, if the Court orders you to answer them it will be necessary for you to answer the questions, and

you will be immune from prosecution on any testimony that you give in here about any transactions to which you are compelled to testify to. Also, the testimony in here in this inquisition cannot be used against you. Do you understand what I mean?

"Mr. Ferris: I understand sir (R. 38-39).

"The Court: * * * However, that does not go to the extent that if you testify in here and testify falsely that you will not [sic] be immune to prosecution for perjury. Do you understand that?

"Mr. Ferris: I understand (R. 39).

* * * * * * *

"The Court: Do you have any questions to ask of the Court?

"Mr. Ferris: No.

"The Court: Proceed.

"By Mr. Kitch Continuing:

"Q. Now, back to the question of whether you are willing to give this investigative body any aid or assistance in identifying those persons who are responsible for acts of violence in which you have no connection yourself. Now, are you willing to help us?

"A. I refuse to help you.

"Q. Just a minute. Are you willing to help us to apprehend those people who have violated our laws in the instances where you yourself have in no way been involved?

"A. I refuse to testify to anything. The whole procedure is illegal in the Kansas Law.

"Q. Do you know Cecil Courtney?

"A. I refuse to testify or to answer questions.

"The Court: Mr. Ferris, as I understand your position, that you refuse to testify in here as to any acts of violence that you may have some knowledge of, even though you are not incriminated in those acts of violence, is that correct?

"Mr. Ferris: I refuse to answer" (R. 39).

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The court again explained the purpose of the inquisition to the witness, whereupon Ferris stated "I believe the hearing is illegal. That is all I believe about it" (R. 40). Thereupon the court stated:

> "The Court: Well, the Court will find you guilty of Contempt at this time. Upon your refusal to answer questions asked in this Inquisition the Court is going to find you guilty of Contempt and is going to sentence you to the County Jail for one year * * *" (R. 40).

Shortly after Ferris was in contempt, petitioner Cecil L. Courtney was called as a witness (R. 49).

After a few preliminary questions and answers, the county attorney explained the purpose of the investigation, that it was confined to violence and that it was not concerned with the taxicab strike around which the violence centered. The witness stated he would cooperate the best he could (R. 49-50).

Thereupon, the court advised the witness as to his rights, substantially as he had Mr. Ferris (R. 50-51). The witness had no further questions as to his rights:

> "The Court: Do you have any questions?
> "A. I believe not" (R. 51).

The examination continued. The witness testified that he had theretofore been found in contempt of court in connection with violating an injunction by throwing a paint bomb (R. 54-55). Upon being asked what the alleged bomb consisted of, the witness objected to answering (R. 55). The court did not require him to answer (R. 55). The examination again proceeded (R. 55-60). The witness objected to a question relating to a cache of bomb fluid and he was not required to answer (R. 60). Other questions were objected to with respect which the witness was not required

by the court to answer (R. 60, 66). The witness was required to and did answer certain other questions to which he objected (R. 69, 70). Thus, he testified over his objection that he and petitioner Ferris dug up a jar of "stink bomb" fluid at the cache on at least three occasions (R. 73). At the witness' request, he was given a "running objection" to the entire line of questioning (R. 73-74). The witness described how he and petitioner Ferris had mixed the fluid (R. 75-78). He testified that early in January he brought the fluid to strike headquarters (R. 79). The following took place:

> "Q. Who did you give it to when you took it down to strike headquarters?
>
> "A. I object.
>
> "The Court: You will be required to answer.
>
> "A. I object.
>
> "The Court: You are required to answer Mr. Courtney. The question is, who did you give it to down at strike headquarters, who did you turn it over to?
>
> "A. I object.
>
> "The Court: You refuse to answer?
>
> "A. Yes, sir.
>
> "The Court: You refuse to answer. The only alternative the court has is to punish you for contempt and the court doesn't want to do that to you, Mr. Courtney.
>
> "A. I am aware of that fact your Honor but I am not going to rat on anybody that I know anything on, if I knew anything I wouldn't tell it, I don't know anything and I ain't going to tell it.
>
> "The Court: You are going to refuse to answer this last question as to who you gave it to down at strike headquarters?
>
> "A. Yes, sir.
>
> "The Court: You know what you are making the court do?

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"A. I am aware of that fact your Honor" (R. 80-81).

The court then held the witness in contempt and sentenced him to 90 days in jail (R. 81).

Two days later, petitioner Parks appeared as a witness (R. 92). Upon being asked where he lived, the witness replied as follows:

> "A. Well, I received this letter that was sent to Mr. Sam Smith and it was sent to me particularly on advice of local attorneys, Ratner, McClellan, Mattox and Ratner, which says it is the legal aspect and that said inquisition is entirely legal but in our opinion some of the phases of the manner in which it is being conducted are illegal and unconstitutional, and it gives four points of law as to why it is illegal. I am basing my refusal to testify on those four points of law here.
>
> "Q. You mean you are going to refuse to testify here before we even get a chance to ask you any questions, is that it?
>
> "A. Yes, sir, I do, because it is illegal" (R. 92).

The letter (R. 90-91) was marked as an exhibit and placed into the record (R. 97). It was written by counsel now representing petitioners, addressed to the business representative of the union (R. 90). In material parts, it is as follows:

> "You have requested our advice as to the legal rights of members of your Union to testify or to refuse to testify at the inquisition * * *
>
> * * * * * * *
>
> "Therefore, if you or any of your members decide, for any reasons of your own, that you or they desire to refuse to testify you should base such refusal on the following grounds:

"1. This inquisition is so conducted that it is illegal and unconstitutional in that, (a) it is being conducted by attorneys not authorized by law. (b) that members of the police department and the sheriff's office are present. (c) that it is otherwise secret. (d) that you are not permitted any legal counsel.

"2. That this inquisition infringes upon your right of free speech.

"3. This inquisition forces you to give evidence which might tend to incriminate you under Federal laws or the laws of other states.

"4. That this inquisition does not afford you equal protection of the law or due process of law" (R. 90-91).

The court fully instructed the witness as to his rights, substantially as he had the other two petitioners (R. 95-96), and then stated:

"Q. Now then I want you to understand what your rights are before we proceed because you are going to be asked some questions, and I want you to understand fully and exactly what your rights are. Do you understand them now?

"A. Yes, sir.

"Q. Mr. Kitch, you may proceed (R. 96).

Examination by Mr. Kitch.

"Q. After the Court advised you about these matters you are going to refuse to answer any questions whether it is incriminating you or not, or has a tendency to?

"A. I refuse to answer any questions whatsoever.

"The Court: Let me say something here. Your refusal to testify is punishable by the court for and as contempt of court?

"A. I realize that, sir.

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"The Court: The Court does not want to have to put you in jail for contempt. I don't think you want to go over there for contempt.

"The Court: But if you refuse to testify the Court has no other alternative. I don't think they need you over in jail to make a test case, we have two of them over there now and that ought to be sufficient to test it. Do you want to take a little recess and think it over?

"A. No, sir. I have thought it over and I still refuse to testify on the basis of that letter" (R. 97).

He stated that he refused to answer any questions whether they tended to incriminate him or otherwise on the grounds that were in the letter (R. 98). "I think it is illegal and unconstitutional" (R. 98). The following then occurred:

"The Court: Ray, you are forcing the Court to do something the Court does not want to do, but you do absolutely refuse to answer any and all questions, is that right?

"A. Yes, sir.

"The Court: The Court finds you in contempt of this Court for your refusal to answer questions and it is the sentence of this Court that you be taken from this court room to the Sedgwick County jail and there be held for a period of one year for contempt of this court" (R. 98).

Journal entries were filed of record in each instance specifying the refusal to answer questions as being contempt, briefly specifying the reasons given for such refusal, and setting forth the sentence (R. 36, 48, 89-90).

Each petitioner filed within two days an application for writ of habeas corpus in the Supreme Court of Kansas and was immediately released under bond (R. 1-11). Respondent sheriff filed answer showing cause of restraint,

attaching copies of the record judgments and complete copies of relevant proceedings (R. 12-98).

No appeal was taken by petitioners to review the contempt judgment. No request of any kind for relief was made or has been made to the district court.

The grounds set forth in the application for writs of habeas corpus are identical, as follows:

> "II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.
>
> "III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas" (R. 2, 4-5, 7-8).

SUMMARY OF ARGUMENT.

I. The questions presented by petitioners (Pet. 4) both rely on an argument that the character of the investigatory proceedings changed after petitioners refused to answer questions and became, at that point, a trial for contempt, requiring, under the due process clause, that the doors of the court room be thrown open to the public and that petitioners be given the right to counsel and trial.

The applications to the Kansas Court for writs of habeas corpus put in issue no such questions (R. 1-3, 3-5, 6-8). The question of secrecy was raised only as an issue of statutory construction and no issue was raised with regard thereto under the Federal constitution. The only Federal constitutional question raised in the applications for writs of habeas corpus had to do with the privilege against self-incrimination, a question now abandoned by petitioners. No issue of any kind was raised respecting the "changed character" of the proceeding.

The petitioners failed to brief or argue the questions sought to be raised here to the Kansas court, or to raise them in their applications for rehearing. The Kansas court considered questions not contained in petitioners' applications for writs of habeas corpus, but it did not consider the new questions now urged (R. 173-192).

Under the circumstances, the Court has no jurisdiction to entertain these petitions for writ of certiorari or to grant the relief sought. *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646; *Wilson* v. *Cook*, 327 U. S. 474.

II. Habeas corpus proceedings in Kansas raise jurisdictional questions only. G. S. Kansas 1949, 60-2213 (App.); *In re Gambrell*, 160 Kan. 620, 164 P. 2d 122; *In re Hanson*, 129 Kan. 597, 283 Pac. 659.

Kansas provides a complete and adequate remedy in the Kansas Supreme Court by proceedings in review of direct contempt judgments. G. S. Kansas 1949, 20-1205 (App.); *Bird* v. *Gilbert*, 40 Kan. 469, 19 Pac. 924; *Wallace* v. *Weber*, 134 Kan. 201, 5 P. 2d 855.

Petitioners failed to avail themselves of this remedy and the questions raised here, had they been presented below, would have been without the jurisdiction of the Kansas Court. *In re Hanson*, 129 Kan. 597, 283 Pac. 659. Consequently, this Court has no jurisdiction to determine the questions with respect which petitioners have not exhausted state remedies. *Woods* v. *Nierstheimer*, 328 U. S. 211; *Edelman* v. *California*, 344 U. S. 357.

III. The court which held petitioners in contempt was at the time acting in a judicial, as distinguished from an investigatory, capacity. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447. It had no investigatory powers or functions. *The State* v. *Jack*, 69 Kan. 387, 76 Pac. 911; *In re Ferris*, 175 Kan. 704, 267 P. 2d 190 (R. 173-192). Its sole rule during the investigation was that of advising petitioners of their rights and of protecting such rights, which it did.

The contempts were committed *in facie curiae*, within the court's own hearing and view, and nothing except what the court saw and heard regarding petitioners' own actions was necessary to a determination of contempt. *Ex parte Terry*, 128 U. S. 289; *Fisher* v. *Pace*, 336 U. S. 155; *Sacher* v. *United States*, 343 U. S. 1. The contemptuous conduct was a willful disobedience to an order of the court specially designed to obstruct the administration of justice.

Under the Kansas statute, requiring the presence of a judicial officer at an investigation, such conduct becomes direct contempt *in facie curiae* subject to summary punish-

ment and the fact that the public continued to be excluded from the court room at the time of sentence does not alter the need for the summary contempt power or the propriety of its use. *Ex parte Terry*, 128 U. S. 289; *Sacher* v. *United States*, 343 U. S. 1; *Eilenbecker* v. *District Court*, 134 U. S. 31; *Myers* v. *United States*, 264 U. S. 95.

ARGUMENT.

I. This Court Is Without Jurisdiction Since the Questions Presented Were Not Raised Below or Called to the Attention of or Decided by the State Court.

This court is without jurisdiction to review the judgment of the Supreme Court of Kansas for the reason that petitioners rely solely on a Federal constitutional question which was not raised below or called to the attention of, or decided by, the state court. *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308; *Howard* v. *Fleming*, 191 U. S. 126; *Wilson* v. *Cook*, 327 U. S. 474. This case is governed by the rule stated in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434-435, as follows:

> "* * * In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

> It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. * * *
>
> "* * * In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. * * *"

Both questions sought to be raised here (Petition for Writ of Certiorari, 4) relate solely to violations of federal due process requirements resulting from the secrecy in which petitioners were held in contempt and sentenced. These questions were not raised in the applications for writs of habeas corpus with which the Kansas court was concerned.

Paragraph numbered I of the applications for writ of habeas corpus are simply recitations of petitioners' arrest, interrogation and sentencing, and do not attempt to set forth any grounds for relief (R. 2, 4, 7).

Paragraph numbered II of the applications raised a question having to do with the authority conferred upon the court by the Kansas statute. The question related solely to the construction of the state statute (R. 2, 4-5, 7-8).

Paragraph numbered III of the applications relied solely upon deprivation of constitutional rights in requiring petitioners to testify to matters that would tend to incriminate them[1] (R. 2, 5, 8).

---

[1]Petitioner Parks also contended (R. 8) that he requested counsel as a witness, but did not urge this on due process grounds or in connection with the present contention regarding secrecy of the contempt proceeding.

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Each of these grounds related solely to questions regarding the regularity and validity of the investigation itself, as distinguished from the validity and regularity of the court's sentence for contempt.

No question was raised as to whether the district court erred in pronouncing sentences *in camera*, or whether it had jurisdiction to do so. Secrecy was mentioned only in connection with the jurisdiction of the court under the statute to hold the investigation *in camera* (R. 1-9).

Secrecy was never mentioned below in connection with any constitutional question, state or federal.

Every question raised and every argument made in this court is based on the "contention of petitioners that the character of the proceedings had changed from an inquisition to a criminal prosecution upon their refusal to answer, and that at that time they were entitled to the procedural standards required in prosecutions for contempt" (Petitioners' brief, 24-25). The petitioners state that this contention regarding the change in character of the proceedings "was largely ignored by the Court below."

Petitioners never in their petitions for writ of habeas corpus made the contention (R. 1-9). No complaint was made therein as to the procedural technicalities in what petitioners now choose to denominate as "prosecutions for contempt" (R. 1-9).

It is apparent from petitioners' testimony, their reasons for refusal to answer, and the course of action they took in using habeas corpus instead of appeal remedies, that petitioners were interested only in attacking and stopping the investigative proceedings. They showed no interest in attacking the validity of the "prosecutions for contempt."

They were interested solely in their asserted right to refuse to answer. They were not interested in their rights as "defendants" in a "prosecution for contempt."

They were testing the power of the court to hold the inquisition with the public excluded. They were not testing the power of the court to sentence for contempt without first opening the doors of the court room.

So far as they related to constitutional questions, the burden of petitioners' applications centered around the controversial question of self-incrimination. But legal research quickly revealed that petitioners were faced with this court's holding in *Jack* v. *Kansas*, 199 U. S. 372. Accordingly, petitioners found it necessary to urge other grounds in their oral argument before the Supreme Court of Kansas.

So it was that the primary question before the Supreme Court of Kansas became a question not raised in the applications. That question was whether the statute authorizing the inquisition was limited to the investigation only of liquor and gambling law violations and cases where the accused was a fugitive from justice. The dissent below was confined to this point, set forth in Syllabus 2 by the Court. *In re Ferris*, 175 Kan. 704, 716, 267 P. 2d 190 (R. 173-174, 189). As is apparent from both the opinion and the dissent, this new question belatedly became the major issue before the Court. *In re Ferris*, 175 Kan. 704, 267 P. 2d 190 (R. 173-192). It was a question of statutory construction decided adversely to petitioners by the only court which can pass upon it.

While petitioners failed wholly to rely on the changed character of the proceedings in their writs of habeas corpus, the Kansas court did consider and decide certain issues regarding the sentences as such. It did this even

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though the questions were not properly raised in this habeas corpus proceeding or by the applications in habeas corpus. Those issues were stated by the court as follows:

> "Petitioners *argue* the sentences and commitments for direct contempt are invalid in that they violate constitutional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel" (*In re Ferris*, 175 Kan. 704, 713, 267 P. 2d 190, R. 185, Italics added).

The question of the secrecy of the so-called "prosecutions for contempt" was not, however, called to the attention of, or discussed by the Kansas court as a constitutional question, either state or federal.

Petitioners' principal reliance is on *Re William Oliver*, 333 U. S. 257. The case was not mentioned by the Kansas court because the question now sought to be raised by petitioners was not before it. In view of the indulgence with which that court treated petitioners' various departures from the issues, it is unbelievable that it deliberately disregarded the *Oliver* case. The vigorous dissent made no reference to *Oliver* or its doctrine. Neither did any one of petitioners' four briefs filed below.

The Supreme Court of Kansas prefaced its discussion of the secrecy question with the following statement of the issue as presented to the Court:

> "Petitioners stoutly contend the *legislative history* of the inquisition statute discloses it was not intended the *inquisition* should be held in secret * * *" (*In re Ferris*, 175 Kan. 704, 712, 267 P. 2d 190, R. 183, Italics added).

As stated in Respondent's Brief In Opposition (5-6), "Of conclusive significance is the discussion by the Kansas

Supreme Court of the Sixth Amendment to the Constitution of the United States and Section Ten of the Kansas Bill of Rights.[1] Both provisions deal, in part, with the right of an accused to a *public* trial. The language dealing with "public trial" was eliminated from the provisions, as quoted by the Court, obviously because it was not material to any issues raised by the petitioners (175 Kan. 710, R. 181). If the Kansas Court had actually been confronted with the issue of whether or not the secrecy of the sentencing violated petitioners' rights under either provision, it is inconceivable that no reference would have been made to the language pertaining to a public trial. Instead, the provisions were examined solely in the light of petitioners' contention that their inability to obtain counsel deprived them of constitutional rights. The Court set forth in its opinion the language of each provision "insofar as material" (175 Kan. 710, R. 181).

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[1]In all criminal prosecutions, the accused shall enjoy the right to *a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to* have the assistance of counsel for his defense. Sixth Amendment to the Constitution of the United States.

In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; *to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.* No person shall be a witness against himself, *or be twice put in jeopardy for the same offense.* Section Ten of the Kansas Bill of Rights.

The italicized portion of each provision was excluded in quotation by the Kansas Supreme Court (R. 181).

In order to give support to their assertion that the questions urged here were raised below, petitioners now rely on quotations from their brief in the court below as hinting at the federal due process questions now urged (Petitioners' Brief, 22-24).

The quotations contain arguments related solely to the Kansas constitution and statutes. But petitioners now state that a suggestion of denial of federal "due process" was "implicit" in the state question propounded, and that the Kansas Court "might have fairly *inferred*" the federal constitutional question. They admit, however, that "due process" was never mentioned (Petitioners' Brief, 24, Italics added).

The generosity with which the Kansas court explored expanded questions negatives the suggestion that it "might have fairly inferred" the present question to exist. In *Whitney* v. *California*, 274 U. S. 357, 362, this court stated, "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature." In *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317, the Court stated, "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The reasoning of this Court in the above case should extend more strongly to a related clause of an entirely different constitution.

Even in their motion for rehearing (R. 192-193) petitioners did not raise the question. The only questions raised in addition to the "Constitutional and Federal ques-

tions heretofore raised" were those going to the power of county attorneys and district judges to grant immunity and the legislative intent regarding such power. This was after the *Oliver* case had been specifically drawn to petitioners' attention (See Reply Brief of Petitioners, 4, 5).

Petitioners presented to the Kansas court in these test cases the ultimate question as to whether anyone could be required to answer questions in such a proceeding. If not, the court had no jurisdiction and petitioners were entitled to their freedom on habeas corpus. Having lost their test case, petitioners now must admit that they were guilty of contempt. But they now insist for the first time that they were not properly sentenced for the offense because their "trial" was not public.

II. Petitioners Are Not Entitled to Relief in Habeas Corpus, Having Failed to Exhaust Their State Remedies by Review.

The record shows, and it is admitted (p. 6 of Petitioners' Brief) that petitioners refused to answer questions. All arguments that they were not required to do so are now abandoned. Hence it must be admitted that they were in direct contempt.

Yet on page 37 of the brief we encounter a factual argument that petitioners were not in contempt. The argument is not properly made in these proceedings.

Petitioners state in their brief (p. 37):

> "* * * It is true that the Supreme Court of Kansas has, in effect, held that the petitioner's contentions were insufficient to justify his refusal to answer the questions propounded. However, that ruling was made in the habeas corpus proceeding, and not in the proceeding which resulted in the petitioner's conviction. * * *"

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The reason that the ruling was not made in the proceeding which resulted in petitioners' conviction was because petitioners failed to appeal to the Supreme Court of Kansas from the order of the court. Kansas provides a complete remedy by means of which a person held in contempt can have the validity of the contempt judgment reviewed and his constitutional rights protected. G. S. Kan. 1949, 20-1205, provides, as follows:

> "That the testimony taken on the trial of any accusation of contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon the direct appeal to or by writ of error from the supreme court, and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the supreme court."

Under this statute, petitioners, though held in direct contempt, could have had complete relief, including the relief now sought. *Bird* v. *Gilbert*, 40 Kan. 469, 19 Pac. 924; *Wallace* v. *Weber*, 134 Kan. 201, 5 P. 2d 855.

Indeed, such a review proceedings would have afforded the only proper forum within which to raise the technical errors now complained of with respect to the so-called "prosecutions for contempt."

This is so because, in Kansas, habeas corpus proceedings by one committed for contempt raise jurisdictional questions only. The statute so providing is G. S. Kan. 1949, 60-2213, which is, in part, as follows:

> "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:
>
> * * * * * * *

> "Third. For any contempt of any court, officer or body having authority to commit; * * *"

See *In re Gambrell*, 160 Kan. 620, 164 P. 2d 122, and *In re Hanson*, 129 Kan. 597, 283 Pac. 659, for interpretations of the statute.

Consequently, petitioners' remedy under Kansas law for the complaints now made was by way of review, not habeas corpus. Under the doctrine of *Edelman* v. *California*, 344 U. S. 357, they should have exhausted that remedy. The Court there stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert* v. *Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617 (1906); *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L. R. A. 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below. * * *"

The Kansas Court was without jurisdiction to decide the matter now urged, and the relief now sought could have been denied in that court, had it been sought there, on such adequate state grounds.

The Kansas Court did consider other questions not technically before it, stating:

> "Fundamental rights pertaining to the liberty of citizens are involved and the court is not inclined to rest its decision on technicalities. We shall fully consider petitioners' contentions as now made" (175 Kan. 704, 708, R. 179).

The Kansas court's consideration of other questions called to its attention but not directly within its jurisdiction in habeas corpus proceedings should not obscure and

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does not detract from the principle of law as stated in *Woods* v. *Neirstheimer*, 328 U. S. 211, 214:

> "From our investigation of the law of the State of Illinois we conclude that the denials of the applications in this case could have rested, and probably did rest, on the ground that habeas corpus is not the proper remedy in cases such as the one before us. For this reason we are without power to review the judgments * * * and the writs of certiorari must be dismissed."

Denial of petitioners' applications, even if construed as broad enough to include the questions now raised, could have rested, with respect to such questions, on the adequate state ground of lack of jurisdiction.

III. Petitioners Were Not Deprived of Any Rights Guaranteed to Them by the Due Process Clause of the Fourteenth Amendment.

A. The Presiding Judge Was at All Times Acting in a Judicial Capacity.

The Kansas inquisition statute (Appendix) supplements the traditional grand jury inquiry into the causes of crime and the necessity of beginning criminal prosecution. Examination of the statute is necessary to an understanding of the proceedings which gave rise to petitioners' commitments for contempt. It will also serve to correct the erroneous statement in petitioners' brief (16-17) that the statute here involved differs only in its terminology from the Michigan statute considered by the Court in *Re William Oliver*, 333 U. S. 257.

For certain specified crimes, not relevant here, an inquisition may be commenced and conducted by the county attorney without judicial supervision; for the investigation of all other crimes the proceeding must also be started

by the county attorney. In such other cases, he must, however, file a written statement setting forth the purpose of the inquisition. A judicial officer must attend and supervise the examination of witnesses. In all cases the county attorney determines from the evidence obtained whether criminal proceedings should follow.

Witnesses are granted complete immunity from prosecution for any transaction concerning which they are compelled to testify. Failure of a witness to answer questions, when ordered by the judge to do so, is punishable as contempt by the judge. Constitutional approval for this phase of the statute was given in *Jack* v. *Kansas*, 199 U. S. 372.

There are substantial points of difference between the Kansas and Michigan statutes. In Kansas there is no amalgamation of investigatory and judicial authority in the judge. The Kansas judge is not and may not become a roving grand jury. Unlike the Michigan judge, the Kansas judge does not begin the investigation, he does not examine the witnesses and he does not decide whether a complaint should be filed. In addition, the Kansas statute requires that testimony be recorded and preserved. And, it is the duty of the judge under the inquisition statute to confine interrogation to questions relevant to the inquiry. *The State* v. *Jack*, 69 Kan. 387, 76 Pac. 911.

The court below emphasized the judicial character of the presiding judge. Kansas is well aware that judicial and executive power cannot be exercised at one time by the same person, and that an inquisitor cannot punish for contempt. *In re Sims*, 54 Kan. 1, 37 Pac. 135. The *Sims* case shows that Kansas, unlike Michigan, long ago anticipated and prevented the vices found present in the *Oliver* case.

The record here reveals that the judge acted solely in his judicial capacity. He performed the function of fully, completely and correctly advising petitioners as to their rights.

Petitioners argue (Petitioners' Brief, 18-19) that the judge has no discretion and that his functions are ministerial. This is contrary to the authority vested in him by the statute as interpreted by the Supreme Court of Kansas. In addition, the record itself shows exercise of judicial discretion here. Petitioners' characterizations of the judge as an "inquisitor" has no basis in fact or law.

So far as the judge is concerned, the Kansas statute differs from the traditional grand jury procedure only in requiring that the judge actually be present while witnesses are examined. If under this procedure the recalcitrance of a witness becomes contempt *in facie curiae* because of the presence of the court, the statute also provides a witness with protections resulting from that presence which he is not afforded in grand jury proceedings.

Long ago this Court held that the due process clause of the Fourteenth Amendment does not prohibit deviation by the states from the common law modes of investigating criminal conduct, and that the traditional grand jury system may be altered or abolished without infringing due process. *Hurtado* v. *California*, 110 U. S. 516. Since the federal judicial power may be invoked, consonant with due process, to compel answers asked a witness by an administrative agency, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, it cannot be urged that petitioners' refusal to testify in a state proceeding to investigate crime could not be properly punished by the judicial power.

The authority of the county attorney to inquire into the causes of acts of violence which disrupt his community

cannot be questioned, and if citizens refuse to give testimony during such an inquiry, they are surely, as in grand jury proceedings, punishable by judicial power. Here petitioners were punished for contempt because they refused to testify during such an investigation, despite a judicial order to answer the questions asked by the county attorney.

Punishment by the judiciary is the customary mode of compelling testimony from recalcitrant grand jury witnesses.

> "The grand jury being merely an appendage of the court, the refusal by a witness to answer questions put by them is a contempt of the court by whose order the grand jury was impaneled." Rapalje, Contempt, Sec. 67, p. 83.

See also, *Hale* v. *Henkel*, 201 U. S. 43, and *Camarota* v. *United States*, (C. A. 3rd) 111 F. 2d 243, certiorari denied 311 U. S. 651. Similarly, the judicial contempt power is properly exercised to compel testimony for investigating agencies unknown to the common law, such as the Interstate Commerce Commission.

> "It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress, in execution of a power granted by the Constitution." *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 487.

B. Contempt Committed in the Face of the Court, Personally Observed by the Presiding Judge, Is Punishable Without Any of the Incidents of Trial.

It is admitted in this proceeding that the petitioners refused to testify during the inquisition proceeding. It

cannot be denied that their refusal occurred in the face of the court and was personally observed by the presiding judge.

Under Rule 42(a) of the Federal Rules of Criminal Procedure:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

The procedure prescribed by the Rule was recently approved by this Court in the case of *Sacher* v. *United States*, 343 U. S. 1, wherein it was noted that the Rule "was intended to make more explicit 'the prevailing usages at law' by which the statute has authorized punishment of contempts" (343 U. S. 7). The rule follows the traditional statements describing the summary contempt power as arising from personal observation of the offensive conduct by the court. Given the contemptuous conduct and its observation by the court, sentencing may follow automatically—nothing need intervene between the occurrence of the act and imposition of sentence. As to this type of contempt, the Court has stated:

> "* * * But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the Government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply

> a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination * * *'" *Ex parte Terry*, 128 U. S. 289, 308.

Other statements of the principle are found in *Ex parte Robinson*, 86 U. S. 19 Wall. 505; *Re Savin*, 131 U. S. 267; and *Fisher* v. *Pace*, 336 U. S. 155.

Rule 42(a) and the foregoing cases authorize summary punishment for contempt when the conduct occurs in the presence of the court and is observed by the judge. Occasionally, direct contempt is said to be contempt committed in "open court." Rapalje, in defining direct contempt, interchanges the phrases "*in facie curiae*"[1] and "open court."[2] It is submitted that both phrases are used to designate conduct occurring while a judge is performing the duties of his office as distinguished from conduct observed by a judge while he is not acting as a governmental official, and that the absence of the public when the contempt is committed does not affect the need for the power or the propriety of its use.

C. A Sufficient Ground for the Exercise of the Contempt Power Is Conduct Which Obstructs the Administration of Justice, Such As Refusal to Obey an Order of the Court.

As they must, if they are to prevail, petitioners attempt to show (1) that no need for the summary con-

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[1]Rapalje, Contempt, Sec. 1, pp. 1-2.

[2]Op. cit., Sec. 111, p. 150.

tempt power exists in the absence of public attendance at a proceeding and (2) that they have been deprived of constitutional rights because the public had no opportunity to observe their commitments. The first contention is dealt with here.

Since their inception federal courts have possessed power to punish summarily as contempt conduct in the presence of the court which obstructs the administration of justice or is disobedience or resistance to an order of the court. The present grant of Federal statutory contempt power is to the same effect.

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." June 25, 1948, c. 645, 62 Stat. 701 (18 U. S. C. 401).

The current act is substantially the same as the Act of 1831.

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2, 1831. 4 Stat. at L., 487" * * *

"The Act of 1831 is, therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2, where there has been misbehavior of any officer of the courts in his official transactions; and, 3, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes." *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 509-511.

The powers described in the statutes and approved by the Court clearly include disobedience to court orders. For disobedience of orders of the court petitioners in this proceeding were punished. They were also obstructing the administration of justice. Argument seems unnecessary to establish that the effective functioning of court proceedings, such as those involved here, may be obstructed although the public do not observe the conduct. Any investigation proceeding is obstructed, to say the least, when witnesses refuse to testify in the face of a court order to do so.

Petitioners' contention that the summary power to punish for contempt may only be exercised to forestall demoralization of the court's authority before an attending public has recently been rejected by this court. *Sacher* v. *United States*, 343 U. S. 1. In the *Sacher* case, it was argued on behalf of the contemnors that the summary power, as defined in *Re William Oliver*, 333 U. S.

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257, could not be invoked except when its immediate exercise was necessary to forestall demoralization of court proceedings before the public. Nevertheless, the court said:

> "We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge * * *" (343 U. S. 9).

Thus the Court has not confined the use of summary power to occasions when proceedings before the public must halt unless the power is immediately exercised. By statute and common law, the disobedience of court orders is made a proper matter for punishment by the contempt power. It is submitted that neither the language of the Constitution or the history of contempt proceedings require that the contemnor be sentenced before the public.

D. Public Attendance Has Never Been a Prerequisite to and Can Have No Effect on the Exercise of the Contempt Power.

In the *Terry* case an adjudication of direct contempt was made while the contemnor was absent from the court room. It appears that the court did nothing more than prepare and file an order finding the contemnor guilty and fixing his punishment. While the offensive conduct may, or may not, have been observed by the public, there is nothing to indicate that the public observed the imposition of the sentence by the court. As in the instant case,

however, the written order was made public by filing of record.

If, as the *Terry* case and Rule 42(a) state, an adjudication of direct contempt consists only of the preparation and filing of a written order by the Court which observed the conduct, what benefit to the contemnor arises from public observance of the proceeding? The public need have no opportunity to see the offender condemned before the court.

> "The precise question, therefore, to be now determined is whether the retirement of the petitioner from the court room, into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment, without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form? In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment." *Ex parte Terry*, 128 U. S. 289, 311.

This court has held that the power may be exercised months after the offensive conduct has occurred. *Sacher* v. *United States*, 343 U. S. 1.

It is impossible to discern any benefit to the contemnor arising from public observation of punishment for prior conduct at a time when no evidence is offered and no defense is permitted. And how is public influence felt

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when the court simply prepares an order or certificate—other than in the judge's knowledge that, after filing, his order will be known?

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." But this Court has stated:

> "While contempt may be an offense against the law, and subject to appropriate punishment, certain it is that, since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis*, and not 'criminal prosecutions' within the 6th Amendment or common understanding." *Myers* v. *United States*, 264 U. S. 95, 104-105.

The claim that the amendment entitles a contemnor to a trial by jury was squarely rejected in *Eilenbecker* v. *District Court*, 134 U. S. 31, 38:

> "It will thus be seen that even in the Act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party to any lawful writ, process, order, rule, decree or command of said court. This Statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the States by virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders was ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts, was due process of law at the time the Fourteenth Amendment of the Federal Con-

> stitution was adopted, and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts."

Petitioners' reference to the words "open court" as the equivalent of "public hearing" in their discussion is not warranted by the cases. The cases clearly show that the words "open court" refer to the presence of a judicial officer acting as such and come much nearer to meaning "*in facie curiae.*" The presence or absence of the public does not affect the use of the summary power.

In *Ex parte Nugent*, (C. C. D. C.) Fed. Case No. 10,375, 1 Hayw. & H. C. C. 287, 1 Am. L. J. 107, 1 Brunner's Collected Cases 296, the United States Circuit Court for the District of Columbia held that the United States Senate could pronounce judgment in secret session for a contempt consisting of refusal to answer questions, the contempt also having taken place in the same secret session. The court in that case stated:

> "It was also contended in argument that although the Senate might hold secret sessions, they could not in secret session punish a man for a contempt. The court, however, cannot perceive any reason why the Senate should not have the same power of punishing contempts in secret as in open session." *Ex parte Nugent*, 1 Brunner's Collected Cases 296, 325.

The *Oliver* case, upon which petitioners seem to rest their entire argument, has no factual resemblance to the instant proceeding. The facts in that case show summary commitment for conduct which certainly was not a direct contempt of court, if it was contempt of any kind. The punishing authority weighed and evaluated testimony and proceeded upon facts not within his knowledge to convict

for "false and evasive swearing." He necessarily decided the issuable fact of the truth or falsity of the testimony. The proceedings constituted, in effect, a trial for perjury. This was recognized by this Court when it stated:

> "* * * The judge-jury was obviously appraising the truth of Oliver's testimony in light of testimony given the same day in petitioner's absence by Hartley and possibly by other witnesses. The Terry Case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence. This case would be like the Terry Case only if the judge there had not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify" (333 U. S. 257, 277).

The case at bar falls strictly within the facts of the *Terry* case as distinguished in the above language. The judge here could correctly detect failure to answer "from simply listening to the witness testify." He could detect contempt "from merely observing a witness and hearing him testify."

As in the *Nugent* case, the contempt in the case at bar was the refusal to answer questions. The contemptuous nature of the conduct at bar was also as apparent as the

assault in the *Terry* case. Consideration of nothing except petitioners' unequivocal conduct seen and heard by the court was necessary.

The officer who imposed sentence in the *Oliver* case was vested with powers of nonjudicial character, and it seems reasonable to conclude that when the offensive conduct occurred it was not in the presence of a "court." Until sentence was pronounced, the role of the "judge" had been that of an investigator. We fail to see how, in the light of the facts before the Court, the decision in the *Oliver* case has any application to an admitted direct contempt personally observed by a presiding judge.

If public trials afford protection to the accused it must largely result from notice of trial to the public as well as the accused. But no notice of intention to proceed and no opportunity to defend are granted a contemnor guilty of direct contempt. *Ex parte Terry, supra.*

In both the *Terry* case and here the judgments of contempt were subjected to public scrutiny when filed of record. Petitioners here have had their commitments examined upon a full transcript by an appellate court. They were free, also, to obtain further review by way of appeal, if they had wished. The Kansas provisions for appellate review of direct contempt are far more liberal than the common law rule[1] which precluded any inquiry beyond the jurisdiction of the sentencing court.

Power to proceed summarily is undoubtedly subject to abuse, but we believe the record fails to show any misuse of power in this proceeding. Concerning the judicial contempt power, this Court has said, through Mr. Justice Storey:

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[1]Rapalje, Contempt, Sec. 141, pp. 198-199.

"Wherever power is lodged, it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice * * *." *Ex parte Kearney*, 20 U. S. 7 Wheat. 38, 45.

CONCLUSION.

The questions presented here were not raised in petitioners' applications for writs of habeas corpus, were not briefed or argued by them, were not raised in their applications for rehearing or otherwise called to the attention of the court by them, and were not decided by the Kansas court.

Petitioners are now attempting to set aside a sentence in habeas corpus proceedings when a complete remedy by review of the technical errors urged in the contempt proceedings was afforded them by Kansas law. Petitioners failed to exhaust that remedy.

For the above reasons, this court has no jurisdiction over this cause, and the petitions for writ of certiorari should be dismissed.

No substantial rights of the petitioners under the Fourteenth Amendment to the Constitution of the United

States were affected. For this reason, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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By .....,
Attorneys for Respondent.

Date .....

APPENDIX.

G. S. Kansas 1949, 62-301.

"If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other person, or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him, at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state. Such subpoena may be served by the sheriff or any constable of the county, or by any other person, a citizen of the county, and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and re-

turned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or any refusal to be sworn as a witness or to sign the testimony given by him, or any refusal to answer any proper questions propounded by the county attorney, attorney general or assistant attorney general, in such inquiry, shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment. If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attorney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued

for the arrest of such person or persons as in other criminal cases. No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state."

G. S. Kansas 1949, 60-2213.

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: * * *

"Third. For any contempt of any court, officer or body having authority to commit; but an order of commitment as for a contempt upon proceedings to enforce the remedy of a party is not included in any of the foregoing specifications."

G. S. Kansas 1949, 20-1203.

"That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon."

G. S. Kansas 1949, 20-1205.

"That the testimony taken on the trial of any accusation of contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon the direct appeal to or by writ of error from the supreme court, and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the supreme court."

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